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In The

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS, et al.,

Petitioners,

v.

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF OKLAHOMA EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS FOR WRIT OF CERTIORARI

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BRIEF FOR THE OKLAHOMA EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Oklahoma Education Association respectfully submits this brief *amicus curiae*, with the consent of both parties, pursuant to Sup. Ct. R. 37.2.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae Oklahoma Education Association ("OEA") is a non-profit association that represents approximately 40,000 public school employees in the state of Oklahoma. Founded prior to statehood in 1889, the OEA represents all levels of education employees in the public school systems of the state of Oklahoma – school administrators, classroom teachers, and education support personnel. The OEA is a state affiliate of the 2.6 million member National Education Association. The OEA's primary focus is to organize around quality teaching and learning while continuing to advocate for and secure the rights and benefits of all public education employees in the state of Oklahoma.

Because the membership of the OEA, many of which are faculty members of the Petitioner School District, is directly impacted by the decision of the Tenth Circuit Court of Appeals interpreting certain portions of the

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[1] No counsel for any party authored this brief *amicus curiae*, either in whole or in part, and no persons other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Letters of consent of the parties are filed herewith.

Family Education Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), the OEA has a unique interest in the potential detrimental effect of this decision upon quality teaching and learning – the primary focus of the OEA in its mission to promote the cause of quality public education in Oklahoma. Accordingly, the OEA submits the perspective of its membership on the significance of this ruling and its impact on traditional pedagogical teaching and learning tools commonly utilized by educators in the state of Oklahoma and throughout the nation.

SUMMARY OF ARGUMENT

There exists no dispute that ensuring a free and appropriate public education for our nation's children has been a primary constant in the political landscape of the last decade. Inextricably intertwined in the current political debate of how best to ensure that ideal are a myriad of interests – political and otherwise – that often create conflicting responsibilities among the primary partners responsible for providing educational opportunities: parents, teachers, and state and local school officials. The enactment of state and federal legislation and judicial rulings that impact the education process – from how to handle blood borne pathogens to ensuring secular invocations prior to athletic events and all that lies in between – has created a legal complexity in public education that is unparalleled in its breadth, if not its scope. Caught squarely in the middle of this increasingly complex maze of state and federal laws and administrative regulations is the classroom teacher. Against this backdrop, the United States Court of Appeals for the Tenth

Circuit has decided an important question of federal law that suddenly has a significant impact on all educators and dramatically alters long-standing customs and practices which comprise the day-to-day operation of our public school systems.

The Tenth Circuit issued a decision involving the construction and interpretation of FERPA that struck down a common grading practice utilized by public school teachers in Oklahoma and which creates the potential for *individual liability* for perceived violations of FERPA in the future. The decision of the court of appeals has not only generated much confusion and uncertainty among public educators throughout the state of Oklahoma as it pertains to the legality of a traditional pedagogical practice, but also raises more questions and confusion regarding the applicability of FERPA to *other* traditional teaching and learning tools commonly utilized by public educators and whether such tools are also prohibited under the interpretation of this federal statute by the Tenth Circuit Court of Appeals.

Recognizing the privacy interests of both parents and students that are set forth in the articulated purpose of FERPA, *amicus curiae* urges review by this Court because this issue involves an important question of first impression under federal law. Since the importance of public education in our society is undisputed, the confusion generated by the decision of the Tenth Circuit among parents, educators, and students should not operate as an impediment to the educational process or otherwise disrupt the daily operations of local school districts in Oklahoma or throughout the nation.

ARGUMENT

The issue before the Tenth Circuit Court of Appeals was whether the practice of allowing a student to grade another student's homework, class work, or quizzes constitutes an impermissible disclosure of "educational records" under the Family Education Rights and Privacy Act. The facts were largely undisputed and the primary factual issue before the court of appeals was whether a traditional teaching practice was prohibited under FERPA – allowing classroom teachers to have students exchange papers for the purpose of correcting erroneous responses and providing an understanding of why a particular response was correct.

This common practice is utilized by many classroom teachers in Oklahoma and is viewed by many as a traditional teaching and learning tool because it allows students to receive immediate feedback on, and evaluation of, their daily work. From a practical perspective, this practice also allows teachers to be more efficient and productive in their day-to-day responsibilities of assessing progress through a student's daily work.

In rejecting this grading practice, the court of appeals concluded that "[B]ased purely on the language of the statute itself, . . . the grades which students record on one another's homework and test papers and then report to the teacher constitute 'education records' under FERPA." *Falvo v. Owasso Independent School Dist. No. I-011*, 229 F.3d 956, 969-970 (10th Cir. 2000) (Footnote omitted). Four

judges dissented from the Court's order denying rehearing en banc and criticized the majority holding as an unwarranted expansion of the clear language of the statute which was unsupported by any legislative history. *Falvo*, 229 F.3d at 960.

The dissenting judges found quarrel with the majority definition of "education records" and argued that the Court's decision creates an implausible obligation of an educational institution under FERPA "to maintain an access record indicating those who have obtained or requested access to" the possible thousands of grades a particular student may accumulate over the course of her common education. *Falvo*, 229 F.3d at 961. The dissenting judges suggested that a careful reading of FERPA and its legislative history required a much narrower definition of "education records" than given by the majority and noted the "obvious difference, however, between grades entered in a grade book (a collective record of the teacher) and the individual grades (on student papers) that are not recorded in a grade book." *Falvo*, 229 F.3d at 960-961. *Amicus* OEA suggests that the interpretations of FERPA by the court of appeals fundamentally fail to both apprehend and correctly apply an "ordinary meaning" analysis of the relevant federal statutory scheme and ignore the appurtenant consequences of an alternative conclusion as suggested by the dissent in the decision presented for review.

I. THE COURT OF APPEALS' REJECTION OF THE LONG-STANDING INTERPRETATION OF FERPA BY THE FAMILY POLICY COMPLIANCE OFFICE OF THE DEPARTMENT OF EDUCATION IGNORES THE JUDICIAL RESPECT NORMALLY AFFORDED SUCH AGENCY OPINIONS

The traditional practice of allowing students to exchange papers for grading purposes had been recognized by the Family Policy Compliance Office ("FPCO") of the United States Department of Education as an acceptable practice under FERPA. FPCO is the federal agency charged with investigating, processing, and reviewing complaints and/or violations under FERPA. The FPCO is also charged with providing technical assistance to educational agencies or institutions in order to ensure FERPA compliance. In its defense of this action, the Petitioner School District relied, in part, on an advisory opinion letter issued by LeRoy S. Rooker, Director of the Family Police Compliance Office, which set forth an advisory opinion by FPCO that this traditional teaching practice did not violate FERPA.

The court of appeals decision specifically concluded that the "Rooker letter" had been afforded an undue degree of deference in the lower court proceeding and summarily concluded that the advisory opinion issued by FPCO was *not entitled* to the traditional doctrine of judicial deference afforded agency interpretations set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because "the meaning of the terms 'education records' and 'maintain' are clear from the statute itself, and a court can only defer to an

agency's interpretation if a statute is deemed ambiguous." *Falvo*, 229 F.3d at 969. Although the court of appeals acknowledged that an agency's opinion generally is "entitled to respect" under the rationale set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the court of appeals then promptly rejected the FPCO advisory opinion by suggesting that the "Rooker letter" did not contain a sufficient explanation of the agency's reasoning, failed to consider the "breadth of FERPA's language," and that the advisory opinion was based on a hypothetical consideration of the issue in the instant case as opposed to a specific factual scenario.[2] *Falvo*, 229 F.3d at 969.

The outright rejection by the court of appeals of the FPCO advisory opinion ignores the value that agency opinions often bring to our judicial system:

> But the Administrator's policies are made in pursuance of official duty, based upon a more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those

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[2] Notwithstanding the court's rejection of the Rooker letter as unpersuasive, the court relied upon the FPCO's statutory interpretation contained in the Rooker letter and subsequent declaration to suggest "that the right which we elucidate today was not clearly established" and then held that the individual defendants were entitled to qualified immunity in the lower court proceeding. Falvo, 229 F.3d at 974.

> for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies and standards are not reached by trial in an adversary form does not mean that they are not entitled to respect. . . .
>
> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, *do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.* . . .
>
> *Skidmore v. Swift & Co.*, 323 U.S. at 139-40 (emphasis added).

Although the court of appeals in the instant case was not bound by the position set forth by the FPCO in its advisory opinion, when viewed in the totality of the circumstances, the policies of the FPCO should be given the respect described in *Skidmore* for several reasons.

First, regarding the court's view that the Rooker letter lacks sufficient reasoning and fails to consider the breadth of FERPA's language, the FPCO opinion interprets the key phrase "educational records" in a simple and straight-forward manner, based on a thoughtful, common sense, and flexible approach. In contrast to the FPCO's interpretive approach to FERPA, the court of appeals utilized a more legalistic approach in defining the term "educational records" contained in FERPA and prefaced its analysis with a disclaimer: "[S]hould our interpretation cause public discomfort or impose undesired burdens, it is to the source of the enactment, Congress, that those who are discomforted or burdened must turn for relief." *Falvo*, 229 F.3d at 1209. Notwithstanding

the disclaimer set forth by the court of appeals, the FPCO advisory opinion on the application of FERPA and the definition of "education records" appears intended to interpret this particular act of Congress in an objective manner and with the intent of producing the desired results for the public good. *See, generally, Skidmore*, 323 U.S. 134 (1944).

Second, regarding the view that the FPCO advisory opinion was based on merely a hypothetical consideration of the issue, the court of appeals ignores the identical factual setting contained in the Rooker letter and subsequent declaration. Apparently relying solely on a qualifying prefatory statement set forth in the advisory opinion, the court of appeals afforded no deference to the opinion's "general discussion" of FERPA as it applied to the *identical* issue presented in the instant case. Simply stated, the court of appeals' interpretation of FERPA and its expanded definition of the salient statutory provisions is in direct conflict with the long-standing position of the FPCO, as stated in the Rooker letter and subsequent declaration. The resulting conflict becomes problematic for those classroom teachers who do not happen to teach within the jurisdiction of the Tenth Circuit and seek interpretive guidance from the agency charged with providing technical assistance to educational agencies or institutions to ensure FERPA compliance.

II. THE COURT OF APPEALS' INTERPRETATION OF FERPA IS CONTRARY TO THE "ORDINARY MEANING" PRECEPT AND HAS CREATED CONFUSION AND UNCERTAINTY AMONG CLASSROOM TEACHERS AS TO WHAT ARE PERMISSIBLE TEACHING AND LEARNING TOOLS UNDER FERPA

In examining the clear language of the statute, FERPA defines "education records" as "those records, files, documents and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). The phrase "and other materials" is instructive in interpreting the intent of Congress by defining "educational records" under FERPA. The common dictionary definition of "materials" suggests something of a physical nature. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 717 (10th ed. 1998). The Latin root of the word material is identical to that of the word "matter" and is defined as a "physical substance." *See id.* at 717. Applying an "ordinary meaning" analysis would suggest that an "educational record" is a tangible item consisting of records, files, documents, and materials. The specific list of materials that are included in the definition of "educational records" refers to the physical repositories of information, not to the information itself. If, as the court of appeals suggests, there exists no distinction between the term "records" and the term "information," then the definition set forth in the first descriptive subsection of FERPA, which states that educational records are materials that "contain information," is rendered superfluous

and one can make no distinction between the materials or the information itself in determining what properly constitutes an "educational record" under FERPA.

Notwithstanding the specific language deliberately chosen by Congress when enacting FERPA, the court of appeals extended the definition of "educational record" to include the scores students may give one another on daily papers pursuant to a traditional grading practice previously deemed in compliance with FERPA by the FPCO. In extending the common meaning of "educational record," the court of appeals stated that "[T]here is no dispute that the grades which students place on each other's papers and then report to the teacher 'contain information directly related to a student' and thus satisfy the first element of the statutory definition for 'educational record.' " *Falvo*, 229 F.3d at 970. This precise holding creates the confusion among classroom teachers concerning the extent and application of the court of appeals' decision as to what constitutes an "educational record" under FERPA.

A grade on an assignment or quiz is nothing more than one of many smaller components which are temporarily "contained" in a disposable grade book by a teacher. These smaller components may or may not be used to help determine a final grade, such as a semester grade. The final grade is the actual "educational record" which is "maintained" by the school district on the student's permanent transcript. If the court of appeals holds, as in the instant case, that one small component temporarily "contained" in a disposable grade book must be afforded protection, then the court must view all minor components which a teacher may or may not use to

derive a final grade as equally protected under FERPA. This would necessarily include other notes which are temporarily "contained" in a grade book, such as attendance records, a record of class participation, and impressions on behavior. Under this analysis, are teachers no longer allowed to ask if students are present, for fear that other students will know that a response or non-response may reveal a small part of a future grade? The sum of the component parts cannot logically exceed the sum of the whole. Accordingly, individual components which may or may not make up a final grade should not be afforded the same protection as the final grade under FERPA.

There clearly exists disagreement and confusion as to whether a "grade," under these circumstances, constitutes a record, file, document, or other material maintained by a school district. In the pedagogical context, a grade is an abstract bit of information reflecting the results of a homework assignment, quiz, or similar assessment. A classroom teacher is constantly assessing and monitoring the progress of pupils under their charge and is constantly re-teaching those individuals who, in the assessment of the classroom teacher, have not mastered the stated objective. In this context, a grade does not contain information as suggested by the court of appeals in its ruling – a grade is information reflecting assessment from the classroom teacher which may or may not be recorded and contained in a record, file, document, or other material maintained by a school district. The court of appeals interpretation of the term "educational record" is overly broad and has created significant uncertainty among classroom teachers who utilize effective teaching habits that require constant assessment and

monitoring of a student's progress in mastering the stated objective. Some measurement, either abstract or tangible, is necessary for the utilization of these effective teaching habits and to assist students in their mastery of a particular subject matter.

A common teaching and learning tool utilized by many pre-secondary classroom teachers is the concept of team learning wherein students are encouraged to "share with their neighbor" what they have mastered with regard to a particular learning objective and to assist fellow students in achieving the same mastery of the stated objective. Such cooperative learning models are traditional pedagogical tools commonly used by educators in Oklahoma and, under the overly broad interpretation of FERPA by the court of appeals, would necessarily involve disclosure of an "educational record" from one student to another when utilizing this common learning tool.

Another common example of a traditional pedagogical teaching and learning tool which may be impacted by the decision of the court of appeals is the practice of requiring oral recitation of a particular subject matter in specific academic disciplines. For instance, where a verbal presentation of a report on a particular literary work or a presentation illustrating the competing interests involved in a social or political issue is a curriculum requirement, do such presentations impermissibly disclose an "educational record" maintained by an educational agency or institution under FERPA? In a more familiar setting, one could certainly posit that the *Socratic* method of learning utilized in many advanced secondary school curricula – particularly where class participation

may have a positive or negative impact on a final grade – also constitutes a prohibitive practice under the court of appeals' holding.

These examples lead to the second subsection of the "education record" definition set forth in FERPA. FERPA requires that the records, files, documents, or other materials in question be *maintained* by the educational institution or an agent acting on behalf of the educational institution. In order to satisfy the disclosure prohibition, the district court below accorded the term "maintain" its ordinary definition of "preserve" or "retain." Similarly, the ordinary dictionary definition of "maintain" is "to keep in an existing state." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 702 (10th ed. 1998). The Latin root means "to hold in the hand." *See id.* at 702. Pursuant to an ordinary dictionary definition, to "maintain" an educational record would necessarily mean that those records, files, documents, and other materials are held and preserved in an *existing state* by an educational institution. In stark contrast to the "ordinary meaning" precept, the court of appeals determined that ordinary homework and routine quiz grades, as distinguished from the actual homework papers or quiz sheets, are educational records maintained by an educational institution because those grades *may be* eventually written in a teacher's grade book. Even where such grades are only utilized as teaching tools for use as a means of providing feedback to students, the court of appeals' decision seemingly deems such information an "educational record" protected by federal law; thereby creating the source of much of the confusion and uncertainty facing classroom teachers in light of this ruling.

Although one could argue that the court of appeals did not conclude that the actual homework papers or quizzes themselves constitute an educational record protected by FERPA, the logic of the court would be incongruous with that argument since the court of appeals held that the homework or quiz *score* given by one student to another is in itself an educational record maintained by a school district, regardless of whether such *score* is ultimately recorded in a teacher's grade book. The logic of the court of appeals in this interpretation is the notion that a particular homework or quiz score exhibits an identical character, both prior to and after it is recorded in a grade book. It is also clear that an undisclosed grade book maintained by a classroom teacher which contains *grades* or other tangible forms of assessing student progress, by definition, is not an "education record" under FERPA. 20 U.S.C. § 1232g(a)(4)(B)(i). The lack of either an abstract or tangible distinction on what constitutes an "educational record" under FERPA by the court of appeals necessarily requires the classroom teacher to seek interpretative guidance from FPCO on this issue.

The FPCO advisory opinion relied upon by the Petitioners in this case recognized the clear language of FERPA and attempted to delineate what constitutes an "educational record" that is "maintained" by an educational institution by giving practical effect to all portions of this federal statute. The policies and positions formulated by the agency charged with preserving the education privacy rights of parents and students are far more likely to reflect a reasoned and informed understanding of the practical aspects of the specific FERPA provisions that impact our nation's classrooms than the often narrow

and sterile view presented to a typical judge. *See, generally, Skidmore,* 323 U.S. at 139.

Since the court of appeals ruling in this case is binding authority only in the six states comprising the Tenth Circuit and since this issue is a question of first impression, the effect of the FPCO advisory opinion and subsequent declaration in this case on all other states not specifically included within the jurisdiction of the Tenth Circuit remains unclear. The issue of individual liability is of obvious personal concern to the classroom teacher and other school administrators. Although the individual defendants in the instant case were afforded the defense of qualified immunity from personal liability because of reliance upon the advisory opinion of the FPCO, putative plaintiffs in other jurisdictions will surely assert that the law is "clearly established" when alleging FERPA violations – technical or otherwise – even where classroom teachers and other school officials rely upon the FPCO advisory opinion and subsequent declaration in those jurisdictions not impacted by the Tenth Circuit decision in this case. Clear guidance on the legal parameters of what does and does not constitute an "education record" that is "maintained" by an educational institution under FERPA is necessary to resolve a question of significant importance not only to educators, but parents and students as well.

CONCLUSION

For the reasons set forth herein, *amicus curiae* Oklahoma Education Association respectfully suggests that this court issue the Writ prayed for by the Petitioners and address the issues set forth therein.

Respectfully submitted,

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